IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

PATHFINDER PETROLEUM COMPANY, a corporation,
Petitioner,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

A Petition for a Writ of Certiorari May be Granted Where the Circuit Court of Appeals Has Decided a Question of Local Law Contrary to the Applicable Local Statutes and Decisions.

Since the decision of the Circuit Court of Appeals is contrary to applicable local statutes and cases, a writ of certiorari should be granted.

Rules of the Supreme Court of the United States, Rule 38, par. 5, subd. b;

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 Supreme Court 817, 114 A. L. R. 1487.

II.

An Insurer Who Insists on a Detailed Proof of Loss and Who, After Receipt Thereof, Advises the Assured of its Rejection of the Proof of Loss in Terms Amounting to a Denial of Liability, Is, Under the Applicable California Decisions, Thereafter Precluded From Litigating the Amount of the Loss.

Petitioner filed with the insurer at the latter's request extensive verified amendments to its proof of loss. [R. 65-113.] These amendments were rendered pursuant to those policy provisions [R. 33] which give the insurer the right to request that defects in the proof of loss be remedied by verified amendments.

Under the terms of the policy, the insurer, upon receiving verified amendments to the proof of loss

> "shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within 20 days after the receipt thereof, or, if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the Company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the Company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto." [Tr. p. 34.]

The only response petitioner received to its verified amendments stated:

> "The amount of loss which this company admits on each or all of the items specified in said preliminary proof of loss is nothing." [Tr. p. 114.]

That the insurer was not sincere in this denial appears from its admissions in the course of the trial [R. 358], where the insurer's accountant, testifying of his examination of petitioner's books early in 1941 [R. 340] (that is, before suit was filed but in proximity to the insurer's denial of all liability), admitted "My computation of the fixed charges based on the eight months to August 31, 1940 was $5,801.25. Based on the three months ending August 31, 1940, $6,198.20."

Being in possession of this information, the insurer was bound to admit that amount of loss in its letter of January 9, 1941. [R. 114.] Its general denial of loss as previously quoted, in view of its knowledge that some loss had been sustained, amounted to nothing more than a denial of liability. Knowing that a loss had been sustained and by denying liability in preference to making specific objections to the proof of loss, it precluded itself from litigating the amount of the loss, and was restricted at the trial to a determination of the sole question whether it did or did not have any liability under the policy.

The contention just made is sustained by the California cases which were called to the attention of the Circuit Court of Appeals, but which were rejected by it.

(a) Specific Objections to the Proof of Loss Are Required by California Statute.

The requirement that the insurer specifically disagree with individual amounts in the proof of loss is the result of legislative policy in California. The "California Standard Form of Fire Insurance Policy" which, with appropriate riders, was adapted to the use of the insurer in issuing the policy here in question, was enacted by the California Legislature in 1909.* It is found in Deering's California Codes, Insurance Code of the State of California, par. 2071. One of its provisions contains the precise words previously quoted from the policy here under consideration. The adoption of this statute antedates the cases of *Lauman v. Concordia Fire Ins. Co. of Milwaukee, Wisconsin*, 50 Cal. App. 609, 195 Pac. 951, and *Victoria Park Co. v. Continental Ins. Co.*, 39 Cal. App. 347, 178 Pac. 724, with which, although the two cases do not expressly mention Insurance Code, Section 2071 or its predecessor, the existing decision of the Circuit Court of Appeals is in direct conflict.

(b) Specific Objections Are Also Required by California Case Law.

Short quotations from each of the two cases will suffice to show that the present decision is contrary also to these local decisions.

In *Lauman v. Concordia Fire Ins. Co. of Milwaukee, Wisconsin*, 50 Cal. App. 609, 195 Pac. 951, the plaintiff set forth in detail the items destroyed by fire, the cost, cash value, and the loss. Upon receipt of the proof of

---

*Cal. Statutes 1909, Chap. 267, par. 5, p. 410.

loss the defendant fire insurance company objected in the following language at page 620:

> "The aforesaid Concordia Fire Insurance Company disagrees with you as to the amount of the loss and damage claimed by you on any and all articles covered under the second item of the form as attached to the policy and described as 'merchandise' and does not admit that you sustained any loss or damage under this item by reason of said fire, as you have failed to show that the goods destroyed or damaged were your property or that you were liable by law for any loss or damage to said goods or that at any time prior to the date of the fire you had specifically assumed liability therefor, nor do you furnish any evidence as to your liability to others in the event said goods were held by you in trust at the time of the fire."

The court said, in reference to this objection:

> "The proof of loss set forth in detail the items paid by plaintiff to third parties; and if the insurance company intended to contest the amount of any particular item, it was required under the terms of the policy to specify the amount of loss it admitted on such items; otherwise it must be deemed to have assented to the *amount of the loss sustained on all items to which no specific objection was made. A general denial of all* liability would not meet the requirement of its obligation under the policy to designate the different articles for which it disclaimed liability." (Italics by counsel.)

The insurer's objection in the instant case is nothing more than a general denial and is not a specific objection to the individual items set forth in the proof of loss.

The case of *Victoria Park Co. v. Continental Insurance Co. of New York*, 39 Cal. App. at 347, 178 Pac. 724, lays down this rule:

> "The term of the policy which required the insurer to express its disagreement with the amount of the loss claimed within the specific time, otherwise it should be deemed to have assented thereto, was a binding condition of the contract. It meant exactly what it expressed or it meant nothing. It cannot be viewed in any sense as directory; the term is inapplicable to contract conditions entered into understandingly by the parties thereto which appear to be of material import as affecting the rights of the contractors."
>
> * * * * * * * *
>
> "It was put upon notice later by the service of the verified proof of loss as to what the amount of damage as asserted by plaintiff company was. At that time it should have, in keeping with the requirements of the contract of insurance, specifically announced its disagreement with the amount of the claim in whole or in part and stated particularly what amount it did admit should be paid to the insured."

If under the terms and conditions of the policy, the insurer can force the insured to set forth in detail the amount of its loss and damage, it should be required by the same token to object specifically to each item set forth

and to admit those items and amounts which its investigation discloses to be proper. Otherwise the legislative policy to provide an expeditious method for arriving at the true amount of the loss is frustrated.

When the insurer contended that the plaintiff had not sustained any loss, the only remaining question was that of liability or lack of liability under the policy. Once the trial court decided there was liability, the amount thereof was no longer subject to dispute, because the defendant in making no specific objections was deemed to have assented thereto. In *Cooley's Briefs on Insurance,* Vol. VII, page 6048, the general rule is laid down as follows:

> "Under the principle that those defects upon which the company intends to rely must be pointed out, an objection to certain defects in the proofs will amount to a waiver of all of those not mentioned."

Therefore, the petitioner was entitled to judgment under Item II of the policy in the full amount of the loss claimed, to-wit, $14,697.27.

III.

The Requirement That Due Consideration Shall be Given to the Experience of the Insured Before the Fire Must be Construed Strictly Against the Insurer.

It is not disputed that the policy provision providing for due consideration of the experience of the insured's business originated with the insurer. While we are in full agreement with the Circuit Court of Appeals that interpretation must be reasonable [R. 399], we do not agree that it is rational to single out the last three months prior to the fire as the period of experience to be taken into consideration but irrational to consider the full eight months since petitioner commenced operations. The drop in the sales price of gasoline was a factor to be taken into consideration. But in order to prognosticate the profits that would have been made had the fire not occurred or, in the language of the trial court, "What would have happened if nothing had happened" [R. 133] other factors and larger periods of time should have been considered.

Not being responsible for the ambiguity which undoubtedly lurks in the language of the policy, petitioner, under California law, was entitled to have this ambiguity resolved in its favor. While under California Civil Code, par. 3542, interpretation must be reasonable, it is provided in the same code, paragraph 1649:

> "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

and paragraph 1654:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

These canons of interpretation are abundantly supported by California cases. By way of example, we quote from *Blackburn v. Home Life Ins. Co.*, 19 Cal. (2d) 226:

> "Because contracts of insurance are not the result of negotiation and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured (*Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421 [213 Pac. 42, 26 A. L. R. 123]; 14 Cal. Jur. 443-445)."

It is not reasonable to suppose that petitioner, when purchasing this policy, expected to lose its protection under the policy because of temporary fluctuations of the market, since as is well known, the price structure in the oil industry at the time in question was highly unstable by reason of competitive practices.

A yet graver error is apparent in the existing opinion, and in the opinion on rehearing in the treatment of the matter of depreciation. On this item there was a dissent among the judges, Mr. Justice Stevens expressing the view that the trial court's finding on the matter of depreciation should not be interfered with by the Appellate Court. Plain justice and fairness requires that since petitioner could have but did not include depreciation in its

fixed charges, it should not be charged against petitioner as an operating cost in determining net profits.

That petitioner's contention regarding depreciation is correct may be seen from the following excerpts from accounting authorities as well as from the transcript:

> "Depreciation is defined by Saliers, in his standard work on the subject, as follows:
>
> "'Interpretation by authorities.—The interpretations placed upon the word by some of those who have given thought to the subject will help one to arrive at a better conception of depreciation. One writer expresses it as "loss in value which has occurred arising from the period during which the property of the undertaking has been in service,"[8] and adds that "depreciation is, properly speaking, an operating expense and should be charged or treated as other operating expenses."[9]
>
> "'*Depreciation is in the nature of a fixed charge* rather than one varying with service.[10] The Interstate Commerce Commission has defined depreciation as "exhaustion of capacity for service," as "lessening in cost value," as "lessening in worth of physical property."[11] The Federal Trade Commission says that depreciation is the most important overhead expense.[12] An English authority employs the term "expired capital outlay" as synonymous with depreciation.[13] The Supreme Court of Missouri calls it "invisible rot." "[14] (Italics ours.)
>
> "*Depreciation, Principles and Applications,* Earl A. A. Saliers, New York, The Ronald Press, 1923.

"[8]Hayes, H. V. *Public Utilities: Their Cost New and Depreciation,* p. 7.

[9]*Ibid.,* p. 136.

[10]*American Economic Review*, I, p. 476. The opposite view is that depreciation should be considered as a capacity cost varying with output. Various considerations render this theoretically untenable, although it is recognized by many authorities as a practical method.

[11] *I. C. C. Valuation Docket No. 2*, pp. 48, 125, 183.

[12]*Fundamentals of a Cost System for Manufacturers*, July 1, 1916, p. 12.

[13]Leake, P. D., *Depreciation and Wasting Assets* (1917), p. 202.

[14]*Home Telephone Co. v. City of Carthage*, 235 Mo. 644."

"Any accountant familiar with the technical literature will readily state that this treatise is the standard authority on the subject.

"The correctness of the foregoing principle that *depreciation becomes a part of the fixed charges* was conceded by the accountant for the defendant insurance company. We quote from his testimony as follows:

" 'Q. What do the eight months show? A. The eight months showed a net profit of $26,194.25.

'Q. And that was after taking out how much depreciation? A. $23,079.59.

'Q. When you take an item of $23,000.00 depreciation out of the gross profits of the company, *doesn't that* [195] $23,000.00 *in your opinion become a part of the fixed overhead of the company?* A. *Yes, I believe that it would.*

'Q. Have you taken that $23,000.00 into consideration in comparing the figures which you have given to this court? A. No, sir, I haven't.' " [Tr. pp. 368-369.] (Italics ours.)

"This admission is in accord with universal accounting practice. A most recent authority on the subject, expressing the same view, is W. B. Lawrence, *Cost Accounting*, Prentice-Hall, 1944, 9. 181."

Conclusion.

We respectfully urge that this petition be granted and that the Circuit Court of Appeals be directed to adopt the applicable California decisions as well as sound accounting practices in giving petitioner the relief to which it is entitled under the policy.

Respectfully submitted,

EARL GLEN WHITEHEAD,
Attorney for Petitioner.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of December, A. D. 1944.

_____

_____

12-14-44—60